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Utah Supreme Court

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IN THE SUPREME COURT APR 16 1964
OF THE
STATE OF UTAH

LAW LIBRARY

STATE OF UTAH, by and
through its Road Commission,
Plaintiff-Respondent,

vs.

BRIANT S. JACOBS and
BARBARA T. JACOBS, his wife;
DARRELL G. HAFEN and
RAQUEL E. HAFEN, his wife;
B.Y.U. EMPLOYEE FEDERAL
CREDIT UNION; and ROAD
RUNNER INN, INC., a
corporation,

Defendants-Appellants,

Case No.
9949

REPLY BRIEF OF
DEFENDANTS-APPELLANTS

APPEAL FROM JUDGMENT OF THE FIFTH JUDICIAL DIS-
TRICT COURT IN AND FOR WASHINGTON COUNTY,
HONORABLE C. NELSON DAY, JUDGE.

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pellants' first brief.)

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Respondents state in their conclusion that the trial of this matter resulted in a fair hearing to all parties; that appellants went to the jury with limited residential land use as the theory of their case and value based thereon; and that this was a decision of their own making, a choice made in litigation which cannot be now abandoned or recanted.

It is clearly evident from the record of this case that the statement of respondent is not true, appellants were not permitted to develop their theory of the case and therefore appellants did not have a fair hearing of the case.

It is felt this brief is made necessary because of a different position taken by respondent on the law in its appeal brief from that taken at the trial, and an unwarranted interpretation of appellants' evidence at the trial.

POINT I

DEFENDANTS WERE DENIED THE RIGHT TO PUT ON ANY EVIDENCE RELATING TO PROBABLE REZONING OF THE SUBJECT PROPERTY.

Plaintiff in its answering brief takes the position that excerpts taken from the transcript by appellants relating to objections and rulings on the subject of possible rezoning of the condemned properties were "out of context," (Br. 18) and that "no foundation of probability" of rezoning was laid. (Br. 23) However, no effort was made to show wherein the quoted material was out of context. Appellants contend that the entire trial was "out of context" in a very real sense because the quoted excerpts are but a few of many similar quotes, as will be hereinafter pointed out, that constitute the rule, rather than the exception, of the nature of the obstacles placed in the road of the landowners' case.

In plaintiff's brief objecting to appellants' Motion for New Trial, plaintiff took a somewhat different position from that taken in its brief before this Court as is evidenced by the following quote:

Even were it proposed (*which plaintiff wholly resists*) that a probability of future zoning change may be evidenced in an imminent domain trial, . . . (Italics added) (R. 145)

The words "*which plaintiff wholly resists*" confirms the fact that plaintiff proposed, and the Court adopted, the trial theory that evidence tending to show probability of future zoning was inadmissible. However, in its brief plaintiff now recognizes and admits (Br. 22 and 23) that there is such an exception to the general rule, but that the saving factor which plaintiff can now assert is the claim that there was no "foundation" of a probability of rezoning.

In plaintiff's brief on the Motion for New Trial which plaintiff filed with Judge Day (R. 137) it was stated that "the testimony of William F. Bell based upon the *proffer* of defendants was not admissible and its exclusion was proper," and, further, that "it was the decision of the court at the trial . . . that the proffered testimony of Bell, golf course architect, could not be received as bearing on any issue before the trier of fact." The basis suggested was two-fold:

Zoning regulations of the subject tract, on the date of assessment of value did not permit

and recognize such proscribed use . . .

The foregoing statements are significant because plaintiff herein recognizes that a proffer of proof was made and, further, that the Court actually ruled that zoning regulations on the subject tract controlled any use to which it could be put for the purpose of determining highest and best use, and value, in the trial of the matter. Certainly, this indicates that it was plaintiff's own version of what the Court did.

Coming back to the matter of what counsel for plaintiff contends to be a failure on the part of the landowners to lay a "foundation" tending to show a probability of rezoning, let us examine counsel's argument more closely. Plaintiff did not suggest how one should go about laying such a "foundation" or just wherein the proffers of proof or excluded testimony failed to measure up to this so-called lack of "foundation." And, in view of the objections raised to any testimony along the lines tending to show a probability of rezoning, it is submitted that plaintiff did not define or explain its contention. As a practical matter, to give real meaning to the word "foundation" tending to establish a probability of rezoning, it is evident that *it was the attempt by the landowners to lay such a foundation which was the very thing objected to repeatedly at every stage of the trial by plaintiff.*

The landowners offered to put on evidence of the needs and requirements of the community and

of the tourists and new settlers coming into the area; and the likelihood that a community would rezone in order to attract new settlers and industry; and the consideration of proximity to existing communities and the available water supply, good lands and soils and scenery; and the fact that spot-zoning and zoning changes were made immediately to the west of the subject property in Middleton; and similar conditions. If such evidence fails to lay a "foundation," then the question is, just what kind of evidence could be introduced? Further, if a proffer of proof (as spelled out in its entirety on pages 19-20 of defendants' prior brief), wherein an offer was made to bring the city officials before the court to prove that the zoning would be removed, and had been considered before the condemnation took place, and that it was removed shortly after the taking became effective — as revealed from the minutes of the Washington City Council meeting, do not come up to the standards of such a "foundation," then it can be said that one lays such a "foundation" only when the zoning has in fact been changed. And that is what plaintiff is really saying in its brief.

Plaintiff's position on the matter of laying a "foundation," is not the law. The quoted cases in the landowners' brief to the effect that a probability of rezoning can be shown from a variety of factors and that an appraiser can consider all of those factors, even without bringing affected public officials into court to indicate what they may or may not do if the matter is presented, are so numerous and so

greatly in favor of the landowners' position that plaintiff cannot meet them head-on. Nor has plaintiff tried to meet the law of those cases except by the unsupported smoke-screen approach of lack of "foundation."

From prior quoted excerpts from the Court's rulings and plaintiff's objections to testimony, it is clear that the Court was excluding any and all references to a probability of re-zoning, no matter how the issue might come up. The comments on the part of the Court and opposing counsel which are set forth below show that the Court excluded everything on the subject, including that which opposing counsel would, without definition, classify as "foundation" material:

THE COURT:

I don't think you people can present evidence here, and I am going to stop you, which will show an illegal or improper use of these premises under the law. . . . (Tr. 63)

* * * *

MR. CAMPBELL:

. . . but let it be well known that it is the position of the State of Utah in the case that any *proposed testimony* or any statement relative to any other use than the — that was recognized and permitted under the zoning ordinance at the time of condemnation are inadmissible. . . . (Italics added) (Tr. 103-104)

* * * *

THE COURT:

The fact of the matter is on September 20, which is the date we are concerned with, nothing had happened. It was not annexed to Washington City; and my thinking on that is it is irrelevant. (Tr. 133)

* * * *

THE COURT:

. . . and my ruling will hold with regard to your proffer on the possibility of rezoning it will stand. (Tr. 166)

* * * *

MR. CAMPBELL:

We feel that it is purely speculative and conjectural to *receive evidence* with respect to whether or not the County Zoning Commission and the County Commissioners themselves may at some time in the future rezone the property. . . .

* * * *

MR. CAMPBELL:

So we look at this property through this view that existed the date the service of summons was made on the property, and whatever happened to this property by way of annexation, by way of zoning change, would be particularly irrelevant . . . (Tr. 36)

* * * *

MR. FULLER:

Before Mr. Campbell answers, I would like to speak to one other issue that is before the Court that Mr. Campbell raised; and I don't

believe that it is in his Brief. It goes to the question of whether we are frozen, so to speak, with the zoning that existed at the time of condemnation. (Tr. 32)

What Plaintiff is saying when it argues that a “foundation” must be laid, is, in reality, a bald statement that no use can be shown for a property unless zoning is actually then in effect permitting such a use. This is made completely clear by further statements taken from the transcript:

MR. CAMPBELL:

We have to assess this property in his answer as it was situated with all benefits and all detriments on it as it was on September 20, 1962; and I think as to what Washington County might do — I mean — *whether Washington City might make an annexation on September 21 of 1962 or 1963, or 1970 is of no concern to us* in determining what the value of the property was on September 20, 1963. (Italics added) (Tr. 132)

Question put to Mr. Kiepe:

Q. (By Mr. Fuller) Did you consider that this property did or did not have any value for construction of dwellings at that time?

MR. CAMPBELL:

Well, now your Honor, we are going to object to that. In the first place, it is leading and suggestive and calls for an answer that any fool can plainly see, and secondly it hasn't been established by foundation — well, I think that would be proper — *there is no foundation*

for the question until we establish what the permitted and recognized use of that land was as of the date of condemnation. Once we get that, then we can establish the highest and best . . . (Italics added) (Tr. 134)

* * * *

When an attorney, through objections which are in turn sustained by the Court defeats a party's attempts to lay a foundation and to put in evidence of "probable rezoning" and of actual proof that rezoning was contemplated and did in fact come about within a short time, he cannot now rely on lack of foundation being laid.

POINT II

DEFENDANTS' APPRAISER DID NOT APPRAISE THE CONDEMNED PROPERTIES FOR ANY USAGE OTHER THAN FOR COMMERCIAL AND SUBDIVISION PURPOSES.

On page 25 of plaintiff's brief it is contended that the appraiser for defendants, Werner Kiepe, appraised the condemned lands for purposes other than for commercial and subdivision uses, and that his appraisal was based on a use tied to "limited residential use tied to small farm acreages." To the contrary, Mr. Kiepe was emphatic in his statements that such was not the highest and best use of the condemned properties, and counsel for plaintiff cut off every attempt by Mr. Kiepe to develop his opinion that commercial and residential uses constituted the basis for his valuation.

Since the transcript itself is much more persuasive than unsupported arguments of opposing counsel having no foundation in evidence, a look at the record is, we think, the answer:

Q. (By Mr. Fuller) Well, now, Mr. Kiepe, did you give any consideration to the possibility that semi-retired persons may locate in this area on what would be classified as a small farm of two or three acres with a dwelling on it?

A. Well, I think that's a potential; and I would assume that it might be, though I would say that that's the exception rather than the rule.

Q. In your opinion, could this property have been sold for that type of usage?

A. Oh, it could have been sold for that.

Q. Did you consider that the highest and best use of this property was for agricultural use? By that I mean crop farming and raising of livestock?

A. No.

Q. And what did you conclude as to that type of usage?

A. Well, I think it is definitely — when it's used, it is going to be used for commercial—

MR. CAMPBELL:

Now if the Court please, we are going to object to that, Your Honor for the same grounds; and I think counsel is trying to do indirectly

what the Court has said repeatedly cannot be done directly. (Tr. 214-215)

The simple fact of the matter is that Mr. Campbell repeatedly objected to Mr. Kiepe giving testimony as to any highest and best use of the properties involved other than that which was specifically permitted under the existing zoning ordinances in effect at the time of taking. After sustaining Mr. Campbell's objection, the Court stated that it was concerned with the property "as of last September" (Tr. 216), to which defendants answered:

MR. FULLER:

That is what we are attempting to determine, your Honor, its highest and best use. (Tr. 216)

The following testimony was the total of defendants' evidence which was received during the entire trial — and probably only because no objection was made by counsel for plaintiff.

Q. (By Mr. Fuller) Mr. Kiepe, I will ask you this question: Do you have an opinion as to what a well-informed purchaser and a well-informed buyer, that is, the fair market value of this land, what they would agree as to the market value of the area in green, that is, the 33.47 acres, do you have an opinion as to the value that piece of property would have had on the market at the time in view of the zoning that was then in effect?

A. Yes.

Q. And what is your opinion as to the value of that property as of that time?

A. My opinion is that it was worth \$67,000.00, which is approximately the rate of \$2,000.00 per acre. (Tr. 216)

For plaintiff to suggest that Mr. Kiepe had departed from his opinion of the highest and best use of the property of the date of taking, so as to substitute a lesser use of the properties in place of what he considered their highest and best use for residential and commercial purposes is simply to read into the testimony a convenient argument. It is quite true that the question put to Mr. Kiepe considered the zoning that was then in effect, but Mr. Kiepe gave his value to the land for residential and commercial usage despite the zoning restriction, since he considered the zoning carried little weight in his appraisal for the reason that the likelihood of re-zoning was very probable. The question asked did not tie values to uses actually permitted under the existing zoning.

On page 29 of defendants' brief, Mr. Kiepe's views on the zoning have been set out, exactly as he gave them at the trial. His statements there indicate that he recognized the zoning that was in effect, that it could be changed, and that it did not preclude consideration of other uses for the properties.

Mr. Kiepe made it completely clear (Tr. 210) that he considered the subject property, because of trends in the area and elsewhere, to be adaptable as

a settlement for retired people and for commercial recreational and residential purposes, and that a buyer coming into the area "would certainly give great consideration to that potential." Obviously, Mr. Kiepe was viewing the value of the property from the standpoint of a well-informed purchaser having knowledge of facts and conditions totally unrelated to small farms or other agricultural uses. This is quite clear from the type of objection which was made to restrict further testimony along those lines:

MR. CAMPBELL:

Excuse me, Mr. Kiepe, if the Court please, I'm going to object to any further testimony along this line on the ground and for the reason as has been stated heretofore and secondly that this witness is apparently looking into a crystal ball and telling us what he feels this area is going to do in the future or is not going to do in the future; and we are talking about market value of this subject property in September of 1962, with those restrictions on its use at that time. (Tr. 210)

Further examination of Mr. Kiepe:

THE WITNESS:

I think that the Southern Utah area has a potential of developing exactly the same type of retired, cities and towns of subdivision for retirees that they have in other places.

Q. (Mr. Fuller) When you speak of Southern Utah, to what extent do you refer to this St. George area?

A. I think specifically close to the St. George area. I have personally visited a number of new settlers in Washington and found they were people who had bought and who were building because they had retired from their homes and were moving into this area. They were in some cases Latter-day Saints who were interested in the St. George Temple. So this is a potential. This is definitely an advantage here.

Q. Now, Mr. Kiepe, from the standpoint of the subject property, to what extent did you feel that it might be adaptable for this special type of settler that might come in wanting a home or a small acreage or whatever it would be.

MR. CAMPBELL:

If the Court please, may I voir dire and make an objection?

THE COURT:

Yes, if it is a voir dire, you may.

VOIR DIRE EXAMINATION

BY MR. CAMPBELL:

Q. Mr. Kiepe, at the time you made your appraisal — by the way, what time was that when you made your appraisal?

A. I was down here in November, 1962.

Q. Did you ever see the property, subject property, before the State had commenced work on it?

A. Yes, there was no work done on it by that time.

Q. And at that time, at the time you saw it and at the time you're assessing value of this property, are you aware of what the zoning regulations were on the property?

A. Yes.

Q. And that zoning called for agricultural uses, isn't that correct?

A. It is zoned for agricultural under the zoning — let's put it differently. It is zoned under the agricultural classification.

Q. And that zoning — have you read a copy of the zoning ordinances, by the way?

A. I have.

Q. And had you read them before you made your appraisal?

A. No.

Q. No, you hadn't. But—

A. Wait a minute.

Q. But the zoning—

A. You said zoning ordinance appraisal, I made it in connection with the appraisal. I had no occasion to read the zoning ordinance before this appraisal.

Q. Well, before you finally made your final conclusion—

A. I made some inquiries about the zoning and knew what it was. I hadn't read it, no.

Q. And that zone limited the use of these properties, of this property as the area that the State seeks to acquire, for agricultural use, isn't that correct, things incident to agriculture, isn't that right?

A. That is right—

Q. Isn't that right, yes or no?

A. Partially right.

MR. CAMPBELL:

Then, if the Court please, we ask that this witness confine himself to testifying with relationship to the uses that can be placed on this property, *and that this property is naturally adapted to under those regulations existing at that time.* (Italics added) (Tr. 211-212-213)

* * * *

After further objections and disruptions in the proceedings, the matter got back to the direct examination of Mr. Kiepe.

MR. FULLER:

Now would you permit us to go into the investigation that he made and the consideration he gave to any *possibility of rezoning or do you wish to exclude us on that?* (Italics added)

THE COURT:

Well, he's already stated that he gave consideration to that. It appears to me, Mr. Fuller, that, sure, there is a possibility. There may be even a probability; but the fact of the matter is, it hadn't been accomplished. It

seems to me we are bound by the facts and circumstances as they then were. We are concerned with the land as it was then and as it was then classified. Any other use at that time, it appears to me, would be illegal and improper. The objection is sustained. (Tr. 214)

To prevent a witness having the high qualifications and reputation of Werner Kiepe from developing his analysis of the highest and best use of the condemned properties as of the date of taking so as to justify his valuation figures, to prohibit all evidence — whether it be termed as “foundation” evidence or otherwise, relating to re-zoning or removal of zoning restrictions by annexation to Washington City and to deny defendants all opportunity of putting in evidence as to uses under the zoning ordinances then existing can not justify plaintiff coming before this court, as stated on page 25 of its brief, and saying:

“Appellants’ have had their day in Court; . . .”

Curiously, although plaintiff’s trial brief follows in most part the same brief which was submitted to Judge Day in Plaintiff’s objection to defendant’s motion for new trial, it would appear that plaintiff should have included the same reference in the brief before this Court that was made in the brief before Judge Day (R. 146) where it was argued:

Kiepe had full occasion to elucidate his opinion on highest and best use and value which he

so did; that the jury rejected such testimony cannot serve as a basis for a new trial. (R. 146)

When the Court gave Instruction No. 16 to the Jury (to which exception was properly taken Tr. 441), the door was closed and the jury had no choice but to ignore all references to uses of the subject property other than those actually permitted under zoning ordinances then in existence.

The herein quoted material certainly is, we think, conclusive. Further reference to the transcript by the Court will reveal the fact that the atmosphere at the trial was at all other times equally adverse to the landowners.

CONCLUSION

These defendants' "day in Court" consisted really of three or four days of futile attempts to present a bare shell of a case which might go to a jury as to the damages to which they were entitled to recover on the basis of the highest and best use of their properties. Defendant's efforts were rejected at every turn by the Court. And, ironically the objections of plaintiff's counsel repeatedly made which were more in the nature of arguments, rather than objections, served as a suitable prelude to Instruction No. 16 which gave the jury no choice but to grant judgment in favor of plaintiff upon values limited to uses actually permitted under the zoning restrictions in effect at the time of the condemnation.

It is submitted that the interests of justice can only be served by granting a new trial. Whether the jury may see fit to again award \$16,000.00 or perhaps an even lesser figure, is totally immaterial. A landowner brought into Court in a condemnation suit is certainly entitled to at least a fair opportunity to present testimony and other evidence tending to establish land values. If the testimony and evidence is weak or unsupported then, certainly, the jury can carefully weigh that evidence which is admitted, and decide accordingly. But to deny such right is to abort justice.

There is another unusual situation presented by the nature of a condemnation matter which some of our Utah courts have apparently overlooked in their analysis of this important type of litigation which has developed along with projects of "progress," and it deserves careful consideration. A property owner is brought into court in a condemnation case *as a defendant and against his wishes*. Yet, in this unwanted position, *he bears the burden of proof on damages*. This situation, and problem, may consist of a few words in a sentence to the average reader — until he finds his property is being condemned. And then the bitter realization strikes home that one of the most precious rights in America — the right to own private property, is being riddled under the guise of public necessity.

And in the process he must pay for qualified appraisers and legal counsel to compete with governmental agencies which are armed to the hilt with

experts and unlimited resources for battling the small landowners, who did not want to sell in the first place, in the hope of getting "just compensation" for his lands taken and possible damage to his remaining lands.

A new trial should be granted.

Respectfully submitted,

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